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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LAKE NACIMIENTO RANCH CO.,
A California Limited Partnership,

Petitioner,

vs.

COUNTY OF SAN LUIS OBISPO, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Three important items stand out in the County's Opposition:

First. Either the County refuses to face the reality that the lower courts are experiencing great difficulty in understanding and applying this Court's concepts of "economically viable use," "reasonable, investment-backed, profit expectations," and "ripeness," or the County is satisfied to live with (and exploit) the confusion for its own gain.

Second. Instead of analyzing and discussing the decisions which the Ranch Co. described in its Petition as *causing* the confusion which has overwhelmed the lower courts, the County blandly — and without any analysis — *cites* those cases as authority for its position. But pretending that those cases provide an answer, rather than being

the problem, won't make the problem go away. Lower courts and litigants suffer with the confusion daily. Legal commentators figuratively rend their clothing.

Third. The County *pretends* to examine the factual basis of this litigation by purporting to "show" the existence of numerous "uses" for the subject property. However, all the County has done is to refer generally to its "laundry list" zoning ordinance of *theoretically* available uses (Opp., pp. 3, 10, 11, 17, 18 n. 21, 21, 22), without *any* analysis of how they apply to *this* property, and without *any* discussion of the evidence presented by the Ranch Co.'s expert witnesses, who testified without contradiction that *none* of those theoretically available uses could be economically developed on this property.[1]

Thus, while it has a scholarly gloss, the County's Opposition is of little aid to the Court in examining the issues at bench. Its argument by evasion and *ipse dixit* does not serve the Court.

THERE *IS* A NATIONWIDE PROBLEM IN DETERMINING WHAT REGULATORY ACTS DENY "ECONOMICALLY VIABLE USE"

The County has presented this Court with a fantasist's view of the law which is not shared by the scholarly community or active practitioners in land use litigation.

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[1] The impropriety of this mode of "analysis" was pointed out in a leading text:

> "Mere provision in the land use regulation for arguably beneficial and economically viable uses is insufficient to avoid a determination that the regulation effects a taking as applied to the property." (Shonkwiler & Morgan, *Land Use Litigation* [1986] §5.04 at 181)

Illustrative is the County's assertion about the ease of application of this Court's concept of "economically viable use." The County says:

> "The courts of appeal that have addressed the issue have applied a *consistent* analytical framework in determining whether economically viable use of property remains." (Opp., pp. 18-19; emphasis added.)

Really? *No one* accepts that simplistic view of the world.

Recent commentary is uniform in bemoaning the *lack* of what the County calls "a consistent analytical framework" for deciding the issue.[2] In the June 1988 Supplement to his nationally recognized treatise, Professor Norman Williams concluded simply:

> " 'An Economically Viable Use.' This phrase has occurred in several instances, but to date there has been *no serious attempt* to define it." (1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 53; emphasis added.)

In a summary of comments collected in the *1988 Zoning and Planning Law Handbook* (Gordon, Ed., 1988), the following appear:

Quoting the National League of Cities:

> "The [U.S. Supreme Court] declared that governments can be sued for compensation for a taking, but said *nothing* about what kinds of actions or level of regulation will be considered a taking." (p. 14; emphasis added.)

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[2] As the Court will note, virtually all of the following commentary was generated within the last 6 months.

Quoting the General Counsel for the National Association of Counties:

> ". . . it is *not clear* what constitutes a taking . . ." (p. 14; emphasis added.)

Summarizing the Editor's views:

> ". . . this area of the law *has not been clarified* and the courts continue to generate *contradictory* opinions utilizing various aspects of the extant 'formulas,' none of which have garnered anything approaching a consensus in the view of bench, bar, and academe." (p. 342; emphasis added.)[3]

In the Spring 1988 issue of The Urban Lawyer, the Assistant Attorney General of Massachusetts concluded:

> "This virtually *standardless* inquiry has provided *little predictability* for property owners, nor has it served as a reliable guide for government action." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400; emphasis added.)

While all participants may not agree on *what the answer ought to be*, all (except the County in this case) agree that there *is* a serious problem and resolution of that problem by this Court would be in the National interest.

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[3] "If there are *no rules* specific enough to control future decisions, then every case is decided according to the *gastronomic school of jurisprudence* — that is, this is an area where government acts according to whim in the individual case, instead of government by rule of law." (1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 25-26; emphasis added.)

THERE *IS* A NATIONWIDE PROBLEM IN DETERMINING THE MEANING AND APPLICATION OF "REASONABLE, INVESTMENT-BACKED PROFIT EXPECTATIONS"

The County's view of reasonable, investment-backed profit expectations is also fantasy. As the County puts it:

> "Petitioner's assertion (pp. 7-15) that there is confusion over the interpretation of 'reasonable investment-backed expectations' is simply incorrect." (Opp., p. 13)

But the County is wrong on this, as well. Others note the true, chaotic, situation:

> " 'Investment Backed Expectations.' This is another phrase which has recently been adopted and repeated widely. Again, it is *difficult to know what to make of it* . . . The state courts have struggled for a long time over the same question . . . Close analysis of these cases indicates that there is *no consensus* in the vast body of state law on this point; it is an area of almost *pure gut jurisprudence*." (1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 54-55; emphasis added.)

> "Although [*Penn Central*] stated that investment-backed expectations are but one factor in the application of a taking clause that has no 'set formula,' they add *yet another complexity to the doctrinal muddle* of taking law." (Mandelker, *Investment-Backed Expectations: Is There a Taking?* [1987] 31 J. Urb. & Contemp. L. 3;

emphasis added.)[4]

> "In several cases since *Penn Central*, the Supreme Court has fleshed out its statement that one of the factors in deciding whether a governmental action violates the just compensation clause is 'the extent to which the regulation has interfered with distinct investment-backed expectations.' This *curious phrase* is *not easily understood or applied.*" (Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches* [1988] 39 Hast. L. J. 335, 345; emphasis added.)

As the commentators make clear, confusion in applying this Court's concept is rampant.

THERE *IS* A NATIONWIDE PROBLEM IN DETERMINING "RIPENESS," AND THIS CASE IS AN APPROPRIATE ONE IN WHICH TO PROVIDE SOME NEEDED ANSWERS

In unstated recognition of this Court's desire to bring rationality to land use litigation, and knowing (although it argues disingenuously to the contrary) that all observers are dissatisfied with the present, confused, state of the law, the County attempts to preserve its litigational victory by seeking to derail this Court from the issues by urging that the "facts" show a lack of "ripeness."

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[4] "Justice Brennan did not indicate whether frustration of investment-backed expectations would be enough to find a taking. His inclusion of these expectations in a list of 'factors' suggests that frustration alone is not enough. *The Court has not yet resolved this question.*" (Mandelker, 31 J. Urb. & Contemp. L. at 4-5; emphasis added.)

The County's supposed "factual" decoys need not concern the Court. A few examples illustrate their illusory nature.[5]

First. The County repeatedly urges that this case is not "ripe" because the Ranch Co. never applied for a development permit. (Opp., pp. 6, 8, 9, 23)

The Ranch Co. agrees that it made no application. What the County refuses to face is the *reason*: the uncontradicted testimony showed that *no* use "permitted" by the County's ordinance could be developed in an economically viable manner.[6] If that doesn't show "futility" (compare Pet., pp. 23-27 with Opp., p. 10), then the word "futility"

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[5] The County has also improperly embellished its Opposition with numerous "facts" which are *not* in the record, most of which are demonstrably false. For example, the County asserts that "waivers and variances are routinely granted." (Opp., p. 11) There is *no* evidence on this point. As discussed hereafter, the availability of variances is severely limited by both County and State law. Additionally, the County denigrates its planning staff memorandum (Pet., App E), asserting that it does *not* say that only 5 uses are even theoretically viable, and that it does not deal with *combinations* of uses. The document speaks for itself, in stating that "the County contends the following uses, or combinations of uses, *could* be economically viable . . ." (Pet., App E-1) Space limitation precludes setting all of the County's fact misstatements straight.

[6] The County's Opposition demonstrates the "game" quality which this rule has taken on. Recognizing that the Ranch Co.'s witnesses had shown that none of the theoretically permitted uses were economically viable, the County urged (and the lower courts agreed) that the Ranch Co. must then prove that no *combination* of such uses would be economically viable. (Opp., pp. 10, 21) The possible permutations are literally endless. There is no value to such game-playing. If viable uses existed, property owners would apply for them. There is no joy in continuous litigation.

has lost all meaning.[7] There is no point in applying for a use which, if granted, could not be developed because it would cost more to develop than could be recouped.

Second. The County urges that this case is not "ripe" because the Ranch Co. never applied for a variance. (Opp., pp. 10, 18 n. 21)

The Ranch Co. agrees that it made no variance application. What the County ignores is that:

- The supposed "variance" procedure would not have provided any relief, because its scope is severely restricted by County ordinance:
  "A variance from the strict application of the terms of this Title or from planning area standards of the Land Use Element *that do not relate to parcel size, density or limitations on use* may be requested as follows . . ." (Opp., App B 5; emphasis added.)
  The uncontradicted testimony showed that it was the *excepted* items (size, density, and use limitation) which made development not economically viable.[8]
- The Ranch Co. satisfied the intent behind this Court's "variance" requirement by applying for a zone change for 800 acres to a use category which *would* permit economically viable use.

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[7] "The lower federal court attempts to *wrestle* with the meaning of 'futility' have led to a *bewildering* set of judicial statements." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report [July-Aug 1988] 49, 53; emphasis added.)

[8] Moreover, as the County knows (see Opp., p. 9), California law *prohibits* granting a variance to change the *use* of land established by the General Plan. (*Herrington v. County of Sonoma* [9th Cir 1987] 834 F 2d 1488, 1496)

> The County denied that application, making it clear that it wanted *no* use made.

The problem is not with the facts of this case, but with the vague and confused state of "ripeness" law. As a more detached government lawyer expressed it, "[l]ike the vagueness of the three-factor analysis [for determining what is a taking], this requirement [*i.e.*, 'ripeness'] has historically worked to the advantage of government regulators." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400 fn. 71) The County's satisfaction with the uncertainty of the "ripeness" test is, thus, understandable: uncertainty, which translates into rigidity in the Ninth Circuit, benefits the County in litigation against its citizens. That makes it neither Constitutional nor right.

Since the Petition was filed, this Court decided *Felder v. Casey* (1988) ___ US ___, 56 USLW 4689. The analysis in *Felder* seems at odds with the strictness of the "ripeness" requirement in land use cases. While property owners are required to seek specific relief from the very agencies which are denying their rights, this Court denigrated such requirements in other types of litigation over Constitutional rights:

> "Given the evil at which the federal civil rights legislation was aimed, there is *simply no reason* to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights in state courts could be required *to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries.*" (56 USLW at 4694; emphasis added.)

This case is "ripe." On the record below, summary judgment was improper. This Court can confidently focus its attention on providing guidance to lower courts, government agencies, and property owners on the proper scope and application of the "ripeness" test. As two noted

commentators concluded in the most recent (July-August 1988) discussion of the issue:

> "The 'finality' requirement has been the *most troublesome* for the lower federal courts *to apply*. Some judges have openly admitted their *difficulty* in determining 'when enough is enough' under this requirement. [Citations.]
>
> "The Court of Appeals for the *Ninth Circuit* has had the most opportunities to refine this first prong of the ripeness doctrine. But its *decisions have not yet yielded any predictable approach* for plaintiff property owners." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation* 11 Zoning & Planning Law Report [July-Aug. 1988] 49, 53; emphasis added.)

CONCLUSION

The County's Opposition refuses to deal with reality. It seeks to hide behind a fictional conclusion that everything is just fine with land use law. The experts quoted in this brief and in the Petition (exasperated commentators and courts alike) demonstrate the contrary.

The Nation needs this Court's guidance. This case presents an appropriate opportunity to provide it.

The Ranch Co. prays that Certiorari be granted.

Respectfully submitted,

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